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IN THE

# Supreme Court of the United States

October Term, 1982

EDDIE JAMES CARTHAN,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT CRIMINAL CASE**

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether Mayor Carthan's conviction was unconstitutional under the due process clause of the Fifth Amendment because the charges against him were so totally devoid of evidentiary support that no rational trier of fact could have found proof of guilt beyond a reasonable doubt?

2. Whether the prosecution and sentence of Mayor Carthan constitute an unjust and illegal discrimination which denied him equal protection of the laws guaranteed by the due process clause of the Fifth Amendment?

3. Whether the cumulative misconduct of the prosecution and error of the court deprived Mayor Carthan of a fair trial in violation of the due process clause of the Fifth Amendment?

4. Whether acts and omissions of Mayor Carthan's counsel denied him the effective assistance of counsel guaranteed by the Sixth Amendment?

TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented for Review | i |
| Table of Authorities | v |
| Opinion Below | 1 |
| Jurisdictional Grounds in this Court | 2 |
| Constitutional and Statutory Provisions Involved | 2 |
| Statement of the Case | 3 |
| Reasons for Granting the Writ | 29 |
| 1. Mayor Carthan's conviction was unconstitutional under the due process clause of the Fifth Amendment because the charges against him were so totally devoid of evidentiary support that no rational trier of fact could have found proof of guilt beyond a reasonable doubt. | 29 |
| 2. The prosecution and sentence of Mayor Carthan constitute an unjust and illegal discrimination which denied him equal protection of the laws guaranteed by the due process clause of the Fifth Amendment. | 34 |
| 3. The cumulative misconduct of the prosecution and error of the Court deprived Mayor Carthan of a fair trial | 38 |

Page

in violation of the due process clause of the Fifth Amendment.

4. Acts and omissions of Mayor Carthan's counsel denied him the effective assistance of counsel guaranteed by the Sixth Amendment. 43

Conclusion 48

Appendix
Opinion Below A-1

TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| Brown v. Board of Education, 347 U.S.483 (1954) | 3 |
| Jackson v. Virginia, 443 U.S. 307 (1979) | 33 |
| Oyler v. Boles, 368 U.S. 448 (1962) | 36 |
| Thompson v. Louisville, 362 U.S. 199 (1960) | 33 |
| Two Guys v. McGinley, 366 U.S. 582 (1961) | 36 |
| United States v. Greene, 578 F.2d 648, 657, cert. denied, 439 U.S. 1133 (1978) | 39 |
| In re Winship, 397 U.S. 358 (1970) | 33 |
| Yick Wo v. Hopkins, 118 U.S. 356 (1886) | 36 |
| U.S. Constitution | |
| Fifth Amendment | 3, 29, 34, 38 |
| Sixth Amendment | 3, 43 |
| U.S. Code | |
| 18 U.S.C. §2 | 3 |
| 18 U.S.C. §1014 | 2, 44 |
| 28 U.S.C. §1254(1) | 36 |
| Fed. R. Evid. 609 (e) | 28, 46 |
| U.S. Supreme Court Rule 17.1(a) | 37 |

Page

Pending Petition for Writ of
Certiorari to the Mississippi
State Supreme Court

Samuel Callahan, et al
v. State of Mississippi
October Term, 1982
No. 82-1023 6

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1982

EDDIE JAMES CARTHAN,

Petitioner,

-vs.-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CRIMINAL CASE

## OPINION BELOW

The per curiam opinion of the United States Court of Appeals for the Fifth Circuit, dated January 3, 1983, affirming the judgment of conviction rendered on February 24, 1982, by the United States District Court for the Southern District of Mississippi is unreported, and is designated "DO NOT PUBLISH." The opinion is set forth in the Appendix.

## JURISDICTIONAL GROUNDS IN THIS COURT

This Court has jurisdiction to review this case under 28 U.S.C. §1254(1). The judgment of the Fifth Circuit Court of Appeals sought to be reviewed is dated and was entered on January 3, 1983.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. §1014 provides in part:

> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of...any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, upon any application, advance, discount, purchase, purchase agreement, commitment or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5000 or imprisoned not more than two years, or both.

18 U.S.C. §2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Petitioner is asserting claims of deprivation of due process and equal protection of law and ineffective assistance of counsel in violation of his rights under the Fifth and Sixth Amendments, U.S. Constitution.

## STATEMENT OF THE CASE

Eddie James Carthan was elected President of the Board of Education in Holmes County, Mississippi at age twenty. At that time, less than twenty years after Brown v. Board of Education, the totally segregated

dual school system outlawed in 1954 had become a totally black unitary system. He served as President for seven years before he was elected the first black Mayor of Tchula, Holmes County, Mississippi.

Holmes County is one of the ten poorest of the more than three thousand counties in the country. Tchula, a town of fewer than 2,000 with 84% of the housing substandard, had more than one third of all welfare recipients in the county.

When Eddie Carthan became Mayor in 1977 the town of Tchula owed over $100,000. It had three full-time employees and two part-time employees and one police car that was inoperable. When Eddie Carthan was forced from the office the town debt had been reduced to $10,000, twenty people worked full-time providing

municipal services, the police had two new fully equipped squad cars, and federal programs employed over 200 people.

Before the end of his term as Mayor, Eddie Carthan was indicted three times. All of the indictments related to his activities as Mayor. State indictments were for assault and murder. This federal indictment was for allegedly making false statements to a Bank insured by the Federal Deposit Insurance Corporation in connection with financing a day care center in Tchula.

History will show the indictments were without factual basis and motivated by racial politics.

A State jury found Mayor Carthan and six co-defendants guilty of simple assault in a racial confrontation over who was legally chief of

police after an effort by Aldermen to appoint his white mayoral opponent to that office. While all other defendants received suspended sentences, Mayor Carthan was given a three year sentence. He has been imprisoned since the fall of 1982, and is now in Parchman penitentiary. A petition for writ of certiorari was filed in this Court on December 13, 1982, Samuel Callahan, et al. v. State of Mississippi, No. 82-1023.

A second State jury acquitted Mayor Carthan of murder in November 1982. Mississippi never contended that he committed the murder. The jury acquitted him of having been involved in it.

This federal indictment contained five counts. The first four involved loan transactions amounting to $20,000 conducted simultaneously

on February 9, 1978 and were merged in the charge to the jury. The fifth count involved a second loan in the amount of $12,500 concluded eight days later in the same manner for the same purpose. All of the counts alleged that Mayor Carthan made false statements to a Bank insured by FDIC in connection with loans made to Harold M. Foreman who was to supply equipment for a day care center.

The record shows that after his election Mayor Carthan vigorously pursued government grants. He applied to as many as one hundred different programs. He spent 2 or 3 days a week in Jackson working with government agencies and travelled to Washington in his efforts.

In November 1977, just months after his election, he met with the Welfare Commissioner of Mississippi,

Fred W. St. Clair and understood from the meeting that Tchula would be given a 100% grant to fund a day care center. He also understood, as was the consistent agency policy, that the town could choose the vendors from whom equipment for the day care center was to be purchased.

Mayor Carthan was soon approached by Robert Louis Bolden, an assistant for minority affairs to the Governor of Mississippi, who offered to help the town secure and expedite the grant. Mr. Bolden recommended Mr. Foreman, a white businessman, as the person from whom equipment should be bought. A key Welfare Department employee described Bolden as "running the show." The Commissioner called Bolden a master of innuendo who "brought many people to the office just as he brought the Mayor there." T 362,

L13-14. He said, "Mayor Carthan said very little." T 363, L1.

Lists of equipment for the Center were prepared. Mr. Foreman set prices for the equipment. Many of the prices were outrageously high. No witness suggested Mayor Carthan prepared the lists or set the prices. A key Welfare Department employee said "I did not believe that Mayor Carthan knew very much about this list at all." T 419, L4-5. Another expressed the same opinion.

For reasons never adequately explained in the record, Mr. Foreman chose to borrow money from the Bank allegedly to purchase the day care center equipment. He testified he could purchase the desired equipment on credit from suppliers and pay within thirty to ninety days, T 115, L13-16, a period within which he could reason-

ably expect to receive payment from the State.

Instead Mr. Foreman borrowed $32,500 from the Bank on total anticipated purchases of $40,000. He claims he paid Jerry T. McNeil, Vice President and branch manager of the Bank a 5% kickback, as was his custom, and gave $9,000 to Mr. Bolden to divide with Aaron Henry, a prominent civil rights worker and Mayor Carthan. No specific amount had been agreed upon according to the testimony of both Mr. Foreman and Mr. Bolden, but Mr. Foreman testified he was told Mayor Carthan was given $2,000. Mr. Bolden could not remember where or how much money he claims he gave Mayor Carthan, or the conversation when he alleges he gave the money. Mr. Foreman says he kept the balance of over $20,000 to pay his own bills including bills of

a company in which Mr. Bolden also had an interest which subsequently went into bankruptcy.

No equipment for a day care center was ever purchased with the money and the bank was not repaid. Mssrs. McNeil, Henry and Carthan all denied they received any money from Mr. Foreman, or anyone else.

All of the business with the Bank was conducted by Mr. Foreman with Mr. McNeil. Mr. McNeil never met Mayor Carthan and talked with him only twice by telephone before the loans at issue were made. One letter, G2, a purchase order, G4, a series of invoices from Mr. Foreman to the town, G3, and delivery receipts G5A-D were presented to the Bank.

A supervisor of Mr. McNeil's at the Bank required an assignment of the invoices to the Bank and

presentation of delivery receipts before approval of the loan.

On February 9, the day Mr. Foreman received the first loan proceeds of $20,000, Mr. McNeil told Mr. Foreman the bank would require delivery receipts. Mr. Foreman then left Mr. McNeil's office and walked to the Bank's parking lot where Mr. Bolden was waiting for him. Mr. Foreman filled out the delivery receipts, backdating them to February 7, and had Bolden sign Mayor Carthan's name. T107.

While all of the instruments bore a signature of Mayor Carthan's name, Mayor Carthan did not sign any of the documents. Greta Nalls, the Town Clerk, signed the letter and purchase order at Mr. Bolden's request, while Mayor Carthan was out of town. She testified Allyeanne Myers and Mr. Bolden "...were trying to get a day

care center by the deadline . . . and Eddie was out of town and they said they needed the signature so I signed it." T 529. L19-23. She never told the Mayor she had signed these documents. Mr. Bolden signed the invoices and delivery receipts himself.

Mr. McNeil never claimed he told Mayor Carthan the equipment had to be delivered or that Mayor Carthan ever told him the equipment had been delivered to Tchula before the loans were made. The letter, purchase order and invoices contained no false statements. The delivery receipts were false since the equipment had not been delivered by Mr. Foreman.

While the Assistant United States Attorney variously referred to the false statements as the telephone calls, the invoices and with emphasis the delivery receipts, the only false

communications possibly attributable to Mayor Carthan were the delivery receipts. Mr. McNeil never claimed he discussed delivery with Mayor Carthan. He testified Mayor Carthan said the town could pay the bank before receiving the grant and would do so after the next Board meeting "so he had to have the merchandise to pay the people that he bought it from prior to that time." But, this was at most Mr. McNeil's deduction. He never claimed Mayor Carthan told him equipment had been delivered. T 60, L18-19; T30, L15-18.

Mr. Bolden admitted he signed Mayor Carthan's name to the invoices and delivery receipts. He said Mayor Carthan told him to do "whatever it took to get the program funded because they were running late." T 184, L22-24. He never claimed he told Mayor Carthan he signed delivery receipts

before the loans were made.

Mayor Carthan stated he never knew of the purchase order which he said was on the wrong form, the invoices, or the delivery receipts until long after the two loans were made. There was no evidence that Mayor Carthan knew of the delivery receipts until after the loans were made. Mayor Carthan testified he never signed any delivery receipt as Mayor.

The circumstances and testimony show Mr. McNeil knew the equipment had not been delivered. The documents themselves suggest this. The purchase order was dated February 6, 1978, the forged delivery receipts February 7, the invoices February 9 and the promissory note and payment to Foreman February 9. This all took place during negotiations for the loan. The second loan involved an even shorter time span.

Mr. Foreman testified he left Mr. McNeil's office when told evidence of delivery would be required, went to the Bank parking lot where Mr. Bolden signed the invoices and the delivery receipts which were promptly taken to Mr. McNeil on February 9. It is particularly telling that Mr. Bolden signed the Mayor's name to the invoices and delivery receipts in the same way eight days later when it was known delivery receipts would be required. Mayor Carthan could have signed the second group of documents any time between February 9 and February 17. But he was never shown the documents or asked to sign them. The purchase involved scores of different items from different suppliers. Physical delivery to Tchula of so many items from Jackson and elsewhere in such a short period was extremely unlikely if not impossible.

The record shows two predications for the investigation that lead to this indictment. FBI Agent George D. Hickman testified an employee of Mr. Foreman named David Boyce reported illegal activities by Mr. Foreman to the FBI. Mr. Foreman was named in many charges alleging kickbacks and fraudulent activity, some involving greater sums of money than this day care center. "...numerous other individuals were involved" in the investigation. T 496, L12-13.

In a plea agreement for his testimony against Mayor Carthan, Mr. Foreman was given a three year prison term with all but one year suspended and a $10,000 fine to dispose of seventeen formal charges and a number of others under investigation. By his own testimony he sought and secured the loan and kept 70% of the funds borrowed

from the bank in this case.

The second predication was testimony by Herbert Coleman, the superior of Mr. McNeil at the Bank who insisted on assignment of invoices and delivery receipts. Mr. Coleman said he caused Mr. McNeil to be fired because of his approval of this and other loans to Mr. Foreman and referred the matter to the FBI only to learn a three year investigation was in progress. Mr. McNeil, who Mr. Foreman testified received 5%, was not indicted at the time of the trial in October 1981.

Mr. Bolden, an aide to the governor, also charged with many and more profitable kickbacks and fraudulent activity, was given a prison sentence with all but four months suspended and a $1,500 fine. It is clear beyond question that the people who promoted the sale of equipment by Mr. Foreman

and negotiated the bank loan were Mr. Foreman and Mr. Bolden. The bank loan was entirely their idea and they benefitted from it. Mr. McNeil had extended prior loans to Mr. Foreman and the Bank loss on them was greater than its loss on this transaction.

Mayor Carthan received the maximum sentence of two years on the fifth count. He received one year on the first four counts, to run consecutively. In practice this is probably calculated to cause a maximum period of incarceration.

Twenty witnesses testified at the trial. The great majority had no knowledge of the bank transactions which formed the basis of the indictment. Rather the State chose to emphasize the over priced equipment and negotiations with the Welfare Department to secure approval of the project.

Most of the negotiations with the Welfare Department were conducted by Mr. Bolden months after these loans. There was a long intensive effort by Mayor Carthan, Mr. Bolden and others to secure the grant for the day care center.

There is no question that many items listed for purchase were grossly over priced. The first witness called by the defendant was Greta Nalls who described the prices as "outrageous." Mr. Foreman vividly described his intent to make a profit. He testified "to my knowledge, every kind of transaction that took place in Mississippi there was a kickback." T 141, L22-23. He knew from prior experience that over priced items would not be approved by the Welfare Department. His prices had been rejected on day care center equipment for Meridian, Mississippi in the Spring of

1977.

The Welfare Department ultimately approved the entire list of equipment for Tchula at 5-6% "above the price for the same items from our usual vendors" for purchase through Mr. Foreman. T 421, L13-14. Department employees were unable to find him or work out the purchases with his company. Mr. Foreman was "failing to communicate" and "failing to deliver." T 360, L2-3. The Tchula day care center opened with equipment purchased from other suppliers in May 1978.

The government announced in its opening statement that it would prove the prices were "totally inflated." T 14, L9. Testimony by witnesses St. Clair, Griffin, Rowse, Landrum, Logan and Myers had little other purpose. Nearly all of the testimony involved periods after the loans and the effort

to obtain approval of the grant. The Welfare Department did not know there were problems with the list until after February 22, 1978, well after the loans. T 438. Government counsel returned directly to the inflated prices in their summations, "Forty-five dollars for a can opener. Remember that testimony." T 814, L23-24. There was never an objection by defense counsel to this extensive, highly prejudicial and irrelevant testimony.

Government counsel failed to advise the defense of contradictory statements of government witnesses by other government witnesses. Its first witness banker McNeil was permitted without objection by the government to testify that he didn't know why he was fired, he assumed it was because of his divorce, when government counsel knew his superior, Mr. Coleman, would

testify he caused Mr. McNeil to be fired because of "self dealings" T 254, L16, and referred the matter to the FBI. Only an FBI report was given defense counsel. There was no notice to Defense Counsel of Mr. Coleman's testimony.

Again government counsel failed to inform the defense that Mr. Bolden, who testified after Mr. Foreman, would deny Mr. Foreman's assertion that Mr. Bolden paid money to Aaron Henry. Defense counsel never objected to the government's failure.

Having presented testimony that Aaron Henry received a payoff, the government then sought to stipulate that Mr. Henry would testify he never received a payoff and objected to his testifying. Mr. Henry's testimony would, and did, directly contradict the government's principal witness, Mr.

Foreman.

FBI Special Agent Hickman was permitted to testify at length about an interview with Mayor Carthan without any inquiry as to whether he gave the Mayor a Miranda warning. On cross examination he volunteered that Mayor Carthan was in his opinion being "a bit deceptive" again without defense objection T 493, L6.

Agent Hickman further testifield on cross-examination that he was not a handwriting expert, but thought the signature on the letter, G2, an innocent document, might be by Mayor Carthan T489-90.

Without objection the prosecution was permitted to show the Board of the non-profit corporation which owned the day care center property borrowed $5,000 and gave it to the defendant the week the trial began.

T 707-8. Undoubtedly the money was a fee for defense counsel and was entirely innocent but the jury never had any explanation.

Defense counsel was not permitted to examine Ms. Nalls or Ms. Jessie Banks about the reasons for the dismissal of Ms. Myers by Mayor Carthan which may have related directly to Ms. Myers' activities in connection with the day care center approval. T 524-5; 790-2.

Nor did defense counsel continue, after government objection was overruled, to cross examine Mr. McNeil about the activities of an employee of Mr. Foreman, named David Boyce. T 65-6. Later testimony by FBI agent Hickman revealed Mr. Boyce was the source of complaints against Mr. Foreman, a fact government counsel must have known. T. 496.

Final arguments were full of misstatements of the facts by counsel. One government attorney argued that Mr. McNeil phoned Mayor Carthan and said "he needed some evidence of the delivery of the items" T 810, L13-4. There was no objection to this critical misstatement. Incredibly defense counsel himself argued to the jury that Mr. McNeil called Mayor Carthan and "told him he had some delivery receipts there in front of him and asked him if that equipment was delivered." T 818-9. There was no such testimony.

Mayor Carthan presented three character witnesses whose testimony in cold print shows the warm affection and high respect in which he was always held. His eleventh grade teacher said his reputation was "superb." T 782. Sister Beverly Weidner of St. Francis Convent who worked with Mayor Carthan

weekly for five years said he was "extremely honest and sometimes painfully honest." T 786, L15-16. Jessie Banks who served as an alderwoman for the Town of Tchula and taught school for twenty years testified "I have been knowing Mayor Carthan before he was born." T 788, 792. She said he had "very, very good character," was "very honest...very, very - he was very honest, excellent." T 793.

Mayor Carthan proclaimed his innocence at his sentencing as he has through his ordeal. To impeach Mayor Carthan the government had him testify to his conviction and 3 year sentence for simple assault. This testimony was extended and its prejudice heightened by the government's inability to prove the conviction a felony and by defense counsel's failure to bring out the pendency of Mayor Carthan's appeal,

F.R.Evid. 609(e), and the conviction's genesis in racial confrontation over the position of chief of police.

Imprisoned as he is in Parchman penitentiary, convicted twice for doing his duty as he saw it as the duly elected Mayor of the Town of Tchula, State of Mississippi, Eddie James Carthan is an American Steve Biko.

## REASONS FOR GRANTING THE WRIT

1. Mayor Carthan's Conviction Was Unconstitutional Under The Due Process Clause Of The Fifth Amendment Because The Charges Against Him Were So Totally Devoid Of Evidentiary Support That No Rational Trier Of Fact Could Have Found Proof Of Guilt Beyond A Reasonable Doubt.

The law has treated Eddie Carthan as the principal in a case where no rational and objective person could find him guilty. He was charged only with false statements to a bank. There is no evidence he made a false statement to the bank, or knew one was made by others until after the loans in question.

The evidence clearly shows Mr. Foreman and Mr. Bolden were business partners who had participated in many corrupt transactions. Mr. Bolden interceded in Mayor Carthan's efforts to obtain a grant for a day care center and brought Mr. Foreman in as the

supplier. These two conceived and negotiated the bank loan and between them kept all $32,500 of the money unless it is believed they paid banker McNeil 5% as a kickback, Aaron Henry an unspecified amount because he was in civil rights, or Mayor Carthan $2,000.

The only evidence that could be construed to link Mayor Carthan to the delivery receipts which were the only false statement made to the Bank is by Mr. Foreman and Mr. Bolden, the two people who committed the crime. Both testified that Mr. Bolden signed the delivery receipts in the Bank parking lot with only the two of them present and that Mr. Bolden told Mr. Foreman Mayor Carthan authorized him to do "whatever it took to get the program funded..."

No reasonable person could believe Mayor Carthan avoided signing any documents to protect himself while masterminding the plan. Obviously Mr. Foreman and Mr.Bolden who used the money to try and save a business of theirs that went bankrupt were avoiding Mayor Carthan. Why else would Mr. Bolden sign the second group of invoices eight days later? They did not want Mayor Carthan to know what they were doing. They apparently hoped to repay the loan after the grant, but by then it was too late for them. Mr. Foreman couldn't deliver.

All of the evidence shows Mayor Carthan's only interest was getting the day care center opened. He worked vigorously for months after the loan and in spite of Mr. Foreman and Mr. Bolden he succeeded.

Even if Mayor Carthan

received $2000, which he vehemently denies, there remains no evidence he made or knew of any false statement to to the Bank. And even the $2000 figure shows the Mayor's powerlessness in the transaction. By the testimony of the perpetrators he had not been told how much he would be paid and Mr. Bolden could not state the amount he claimed he alone gave the Mayor or the place.

The outrageous overpricing of the equipment was not done by Mayor Carthan, or profitable to him. Mr. Foreman who priced the items benefitted. The higher the price, the greater the profit, he testified. Yet more testimony presented by the prosecution was directed to the inflated prices than to the alleged false statements. Then the prosecution lamely explained its failure to prosecute this conduct designed to

defraud the federal government by explaining they were caught before the crime was consummated, as if attempt was not an offense.

The record as a whole must be reviewed to evaluate this issue. The Court should request the entire record for this purpose.

On review it is believed the Court will agree that the evidence of guilt in this critically important civil rights case is so shockingly inadequate as to deny Mayor Carthan due process of law. See Jackson v. Virginia, 443 U.S. 307 (1979); In re Winship, 397 U.S. 358 (1970); Thompson v. Louisville, 362 U.S. 199 (1960).

2. The Prosecution and Sentence of Mayor Carthan Constitute an Unjust and Illegal Discrimination Which Denied Him Equal Protection of the Laws Guaranteed by the Due Process Clause of the Fifth Amendment.

The original investigations that led to this indictment were of Mr. Foreman for a long history of corrupt acts involving sales to government funded projects and Mr. McNeil for "self dealing" as a bank official. Mr. Bolden was discovered to have been involved with Mr. Foreman and others in a number of corrupt acts. Yet when a twenty-seven year old black Mayor of Tchula is suspected of having helped experienced confidence men secure one loan for their benefit, he becomes the principal target.

Mr. Foreman with a list of charges seventeen long and other offenses under investigation, who overpriced equipment to be supplied to the day care center and testified that in other

similar sales he sometimes did not deliver any merchandise for which he was paid became insignificant compared to Mayor Carthan who did nothing wrong. With the possibility of uncovering extensive public corruption, the charges and investigations of Mr. Foreman were abandoned and settled for one year in prison. Mayor Carthan received sentences of two years and one year to run consecutively.

Mr. Bolden held a position of far greater power, influence and capacity to corrupt than Mayor Carthan who earned $60 per month most of the time he held office. Mr. Bolden was an assistant to the Governor. He had been prominent in Mississippi politics for years. He initiated the course of conduct that caused the Bank's loss. He was known to have engaged in many other corrupt acts.

He received a four-month prison term, compared to thirty-six months for Mayor Carthan.

Mr. McNeil the banker who allegedly took kickbacks from many bank customers and who, knowing there was no delivery of the merchandise, approved this loan to his customer Mr. Foreman, had not been charged with any offense more than two and a half years after charges were preferred by his own bank.

The "evil eye" and "unequal hand" obviously infecting this prosecution and the implications for civil rights, voting rights and racial justice require a reversal. See Yick Wo v. Hopkins, 118 U.S. 356 (1886); Oyler v. Boles, 368 U.S. 448 (1962); Two Guys v. McGinley, 366 U.S. 582 (1961).

Under its plenary power of federal court review, 28 U.S.C. 1254(1)

and its supervisory power over lower federal courts, Supreme Court Rule 17.1(a) this Court should set aside the judgment and sentence below.

3. The Cumulative Misconduct of the Prosecution and Error of the Court Deprived Mayor Carthan of a Fair Trial in Violation of the Due Process Clause of the Fifth Amendment.

The Court of Appeals deemed the testimony of Mr. Foreman and Mr. Bolden sufficient, if believed, to establish Mayor Carthan's guilt. Although we disagree with the Court on the sufficiency of this testimony (see Point 1, supra), the Court in so concluding tacitly recognized that the bulk of government's case was superfluous. It nonetheless upheld against a claim of prejudice the admissibility of the government's proof of negotiations for approval of the day care center and other events subsequent to the making of the loans on the ground that these were surrounding circumstances showing "the entire scope of the illicit scheme." (A-3). The

Court's reasoning lacks force. The illicit scheme at issue in this case was the making of false statements to the bank for the purpose of influencing it to make loans; events subsequent to the making of the loans had little if any bearing on the question whether Mayor Carthan committed that alleged crime. The Court's reliance on U.S. v. Greene, 578 F.2d 648, 657, cert. denied, 439 U.S. 1133 (1978) is misplaced because in Greene evidence of other loans "was introduced solely to aid the jury in understanding the circumstances leading up to the loan in question," 578 F.2d at 658. Evidence of subsequent negotiations and other events in the case at bar had no such explanatory function.

Excesses in the scope of the government's proof need not stand

alone, however, for there were several other sources of prejudice and unfairness, including the undue emphasis given to Mayor Carthan's prior conviction for simple assault, and his receipt prior to trial of $5,000 from the Tchula Development League representing proceeds of a mortgage on the day care center building. Repeated misstatements of testimony, confusion between delivery receipts and invoices, derelictions by government counsel with respect to Brady and Jencks material, and other errors in the trial -- all detailed elsewhere in this petition -- enter into the trial's cumulative unfairness.

Mention needs also to be made of the Court's repeated intervention in the presentation of evidence, which a close reading of the record will show, while perhaps unexceptional in individual

instances considered alone, was invariably on the side of the government. The Court's questions, for example, emphasized vivid details of the alleged payment by Mr. Bolden to Mayor Carthan which Mayor Carthan unequivocally denied. T185, L5-T187, L7. Other questions by the Court had the effect of seeming to dispel Mr. Bolden's confusion, leading him to employ the term "delivery receipt" rather than "invoice," e.g. T183 L8-19. Overall, this intervention immeasurably bolstered the government's case by sharpening its proof and conveying an impression to the jury that the Court deemed the government's evidence to be credible.

As is true of Point 4 which follows, the unfairness of the trial received by Mayor Carthan needs to be

assessed on the record as a whole. This petition can only highlight this unfairness and point to the need for full review.

4. Acts and Omissions of Mayor Carthan's Counsel Denied Him the Effective Assistance of Counsel Guaranteed by the Sixth Amendment.

The defense of Mayor Carthan at trial was not an easy task, given the "evil eye" and the "unequal hand," infecting this prosecution (Point 2, supra). This difficulty heightened the need for effective assistance of counsel.

The statement of the case and argument which have preceded this point refer to various ways in which it is submitted trial counsel failed to provide effective representation.

To touch briefly upon these and some other points, defense counsel acquiesced in the excessively broad scope of the government's case, interposing no objection to evidence dwelling on over pricing of equipment, efforts to secure State approval of the day

care center and other negotiations and events subsequent to the false statements and bank loans that were the crux of the charges against Mayor Carthan under 18 U.S.C. §1014.

Defense counsel interposed no objection to the Court's instructions to the jury. Given the extensive testimony about the over pricing of equipment, defense counsel should have excepted to the Court's inclusion in its statement of 18 U.S.C. §1014, of willful over valuation of property. This reference created the possibility the jury would deem over pricing to be an alternative to the making of a false statement as an element of the crime, which even the government did not contend.

On the crucial issue of Mayor Carthan's knowledge of the false

delivery receipts that were given to the bank, defense counsel did not object to the misstatement of government counsel that Mr. McNeil phoned Mayor Carthan and said "he needed some evidence of the delivery of the items," T810, L 13-4. Indeed he himself similarly misstated to the jury, T818-9, Mr. McNeil's actual testimony about his two telephone conversations with Mayor Carthan in which there was no mention of delivery or delivery receipts, T23-24, T30 and T60. Defense counsel also failed to dispel or to even call attention to the instances where Mr. Bolden appeared to confuse invoices with delivery receipts to Mayor Carthan's prejudice.

The attempted impeachment of Mayor Carthan on the basis of his conviction for simple assault should have

been met, but was not, by a showing that an appeal was pending, F.R.Evid. 609(e) and by an explanation of the genesis of the charges in that case.

In cross-examining Agent Hickman defense counsel elicited potentially harmful opinion testimony about signatures that the witness was not competent to give and failed to object when Agent Hickman volunteered his opinion that Mayor Carthan had been "a bit deceptive." Defense counsel failed to take issue with the apparent failure of Agent Hickman to give Mayor Carthan Miranda warnings.

Defense counsel also failed to take effective issue with the government's failure to advise it of contradictory statements of government witnesses by other government witnesses.

In another instance, defense

counsel objected to the government's taking of handwriting exemplars at trial from Ms. Nalls on grounds she was nervous and two years had passed. These objections, which were overruled, gave credibility to the suggestion unsupported in the testimony that perhaps Mayor Carthan did sign this document which contained no false statements. Indeed written after the signature was "by Greta Nalls." Defense counsel's objection should have been based on the irrelevance of the question, the meaninglessness of attempting to compare ways in which one person signs another's name and the request to the jury that it question handwriting when no expert testimony on the issue was offered.

The Court of Appeals devoted well over half of its brief opinion to its rejection of Mayor Carthan's contention he did not receive the effective

assistance of counsel. As the Court of Appeals itself recognized the assessment of this issue must be "based upon the totality of circumstances in the entire record." It is thus not a subject which can be thoroughly explicated in this petition seeking discretionary review. The subject deserves full analysis and review.

## CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

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March 3, 1983

# APPENDIX

DO NOT PUBLISH

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 82-4090

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDDIE JAMES CARTHAN,

Defendant-Appellant.

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Appeal from the United States District Court
for the Southern District of Mississippi

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( JANUARY 3, 1983 )

Before CLARK, Chief Judge, RUBIN and Williams, Circuit Judges. PER CURIAM:

Eddie James Carthan was convicted of obtaining a series of loans from the First National Bank, Jackson, Mississippi, through the

making of false statements, in violation of Title 18, U.S.C. § 1014 as well as the general provision of 18 U.S.C. § 2. In obtaining these loans, he was involved with two other persons who pleaded guilty and testified as government witnesses. Carthan claims errors in the trial.

He makes the usual claim of the lack of sufficient evidence to uphold the verdict. But if the testimony of the other two persons who participated with him in the fraudulent loan scheme is to be believed, the evidence of his guilt is overwhelming. The jury had the right to believe those witnesses.

The attention of this Court is directed in more detail by the appellant to the issue of adequate representation by counsel. The charge of inadequate representation is based in part

upon the failure of counsel to object to certain evidence being admitted at the trial and to certain jury instructions. We also consider the more general claim of inadequacy of representation.

First, appellant asserts the failure of his counsel to object to the admission in evidence of certain testimony and exhibits which were related to the negotiations between appellant and those working with him and the bank from which the fraudulent loans were obtained. His claim of prejudice under Rule 403, Fed.R.Evid., cannot be sustained. The circumstances surrounding criminal activities are admissible to show the entire scope of the illicit scheme. United States v. Greene, 578 F.2d 648, 657, cert.denied, 439 U.S. 1133 (1978). There was no prejudice

beyond that created by the existence of relevant evidence.

The claim that defendant was prejudiced because his counsel did not object to some of the testimony of those associated with him in the criminal conduct as hearsay must be denied. Statements by coconspirators in the furtherance of a conspiracy are admissible in evidence even though they are hearsay. United States v. Sutherland, 656 F.2d 1181, 1199 (5th Cir. 1981), cert.denied, 102 S.Ct. 1451 (1981).

In cross-examination of Carthan, the government elicited evidence of a prior felony conviction for assault on a police officer. There was some difficulty in the trial because Carthan testified that the conviction was for "simple assault". But he conceded in his testimony that the sentence adjudged

against him was for three years. This, on its face, clearly established that the prior conviction was a felony and was admissible in evidence. His own testimony established that his conviction was for a felony, once he stated the length of the sentence. A prior conviction can be established by cross-examination of an accused and there was no ground for an objection by his counsel. United States v. Scott, 592 F.2d 1139, 1142 (5th Cir. 1979).

There is a further attempt by Carthan to establish inadequacy of counsel by a failure to object to instructions to the jury. We find that the instructions taken as a whole adequately defined the offenses charged without improper prejudice to the defendant. Counsel need not have objected.

Nor can a generalized claim of inadequate representation by counsel be accepted. In this Court, the right to counsel has consistently been interpreted as the right to "effective" counsel, that is, "not errorless counsel and not counsel judged ineffective by hindsight," but counsel "reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), modified, 289 F.2d 928, cert. denied, 368 U.S. 877 (1961). See Hill v. Wainwright, 617 F.2d 375, 380 (5th Cir. 1980). The methodology for applying this standard involves an inquiry into the actual performance of counsel conducting the defense and a determination of whether reasonably effective assistance was rendered based upon the totality of circumstances in the entire

record. Washington v. Estelle, 648 F.2d 276, 279 (5th Cir. 1981); Lovett v. State of Florida, 627 F.2d 706, 708 (5th Cir. 1980).

We have made a thorough review of the entire trial record. The record reveals that counsel's performance was more than adequate. There was no omission or error which approached rendering the trial fundamentally unfair. The attorney filed and presented a number of pretrial motions and conducted interviews with government witnesses. At trial, he objected to the government's leading questions and vigorously attacked the credibility of the government's witnesses by stressing the details of the plea bargains which had been made. He asked the court for a recess to study a statement made by one of Carthan's associates when the state-

ment had surfaced before counsel had had the opportunity adequately to examine and evaluate it. Further, counsel attacked the government's witnesses by bringing out their prior inconsistent statements to the FBI. The attorney carefully and thoroughly argued to the court concerning his proffers of extrinsic evidence of misconduct of a witness. He introduced three witnesses to testify as to Carthan's reputation for veracity and integrity. He moved for acquittal at the end of the trial and was also responsible for convincing the district court to consolidate the first four counts against Carthan into a single offense. Closing argument was strong and thorough. We must conclude Carthan was effectively represented by counsel.

Finally, Carthan claims that he could not be guilty of the offenses charged unless it was shown that the Department of Public Welfare, in the name of which the fraudulent loans had been obtained, did not become indebted under the loans. He argues that the jury was not specifically instructed on this point. The evidence is clear, however, that the goods were never delivered to the DPW facility, which is the critical factual aspect of the fraud. The jury instruction was adequate to set out the elements of fraud in the transactions involved.

Finding no error in the trial, the judgment of the district court is AFFIRMED.